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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

I/S NOREXIM, and M/V TENTO,
Petitioners,

vs.

GULF TRADING & TRANSPORTATION CO., and
PERMAL SHIPPING CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the test for choice of law to determine the validity of a maritime lien claim against a vessel for supplies or services be identical to the test employed in a seaman's injury tort claim, or should the test for maritime lien claims be in accordance with generally accepted choice of law principles applicable to security interests?

2. If the choice of law test applicable to a seaman's injury tort claim is also applicable to a maritime lien claim, does a Norwegian domiciled shipowner with no place of business in the United States have an American base of operations simply because the sub-charterer of its Norwegian flag vessel contracted in the United States with American companies for goods supplied and services rendered to the vessel in foreign ports and because the vessel made voyages to United States ports from time to time?

3. Did Congress intend the maritime lien provisions of the Ship Mortgage Act (46 U.S.C. §§ 971-973) to apply to lien claims arising in foreign ports and involving foreign flag vessels?

PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings below are contained in the caption of the case. I/S Norexim is wholly owned by E.B. Aaby's Rederi A/S of Oslo, Norway.

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**On Writ of Certiorari to the
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For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was published in 694 F.2d 1191. The text of the opinion is set forth in Appendix A *infra* at pages A-1 through A-12. The findings of fact and conclusions of law of Judge William A. Ingram of the United States District Court for the Northern District of California are not reported. They are set forth in Appendix A, *infra,* at pages A-13 through A-17 and A-20 through A-24.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the district court was entered on December 20, 1982. This court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Ship Mortgage Act, 1920, 46 U.S.C. sections 971-973 (Maritime Lien Statutes):

§ 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

§ 972. Persons authorized to procure repairs, supplies, and necessaries

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

§ 973. Notice to person furnishing repairs, supplies, and necessaries

The officers and agents of a vessel specified in section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel.

STATEMENT OF THE CASE

Respondents Gulf and Permal brought separate *in rem* actions in the district court against the motor vessel *Tento*. The district court had jurisdiction of each action under 28 U.S.C. section 1333. Petitioner I/S Norexim was not named as a defendant, but appeared as claimant of its vessel and defended the actions on the vessel's behalf.

The *M/V Tento* a Norwegian flag vessel, was at all relevant times owned by a citizen and resident of Norway. It was a "tramp" steamer and was not operated in a regularly scheduled service. (Tollefsen Deposition, p. 65, Gulf CR No. 21.)[1]

In 1977 *Tento* was under time charter from its owner to Aspen Steamship Company and from the latter to Coin, S.A. (Permal Findings, Nos. 2 and 15; CR 30.) Under the Aspen-Coin contract, Coin was obligated to provide and pay for the vessel's fuel and for canal tolls. The charter party between Norexim and Aspen, dated at New York, imposed similar obligations upon Aspen, provided for

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[1]The "voyages to United States ports" referred to in footnote 1 of the decision below at 694 F.2d 1192, Appendix A-2 involve simply the conclusion of the voyage to the United States which preceded the charters to Aspen and Coin, followed by the commencement of the voyage from the United States under those charters.

arbitration of disputes and payment of charter hire in New York and incorporated by reference the United States Carriage of Goods by Sea Act, 1936. The district court found that neither Gulf nor Permal was aware that the *Tento* was operating under these time charters. (Gulf Findings, No. 13; Permal Findings, No. 13.)

On the voyage in question the *Tento* sailed from Boston bound for the Mediterranean Sea and the Suez Canal.

The Gulf Transaction. While *Tento* was enroute, Coin, S.A., decided to refuel it in Italy, and the Gulf transaction resulted. Coin's New York agent asked a fuel broker in New York City to arrange for fuel to be supplied to the *Tento* in Italy. The broker contacted respondent Gulf at its New York City sales office and made an oral contract for sale and delivery of the fuel. Gulf, a Delaware corporation, contracted with an Italian company, AGIP, to deliver the fuel to the *Tento* in Italy. Gulf paid AGIP and sent an invoice addressed to the *Tento* in care of Coin's bunker broker for $105,447.46. Coin, S.A. did not pay the invoice.[2] Gulf claimed a maritime lien against the *Tento* for this amount.

The Permal Transaction. Permal Shipping, which operates from New York City, is a division of a New York corporation, Permal International, Inc., an affiliate of another firm in Paris. Coin's New York agent asked Permal

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[2]The statement in the opinion of the court below in respect to the cost of the fuel delivered to the *Tento* that "neither Coin, as subcharterer, nor Norexim, as owner, paid the invoice" issued by Gulf, 694 F.2d 1192, is technically accurate, but is misleading to the extent it implies that Norexim was personally liable to Gulf for Coin's debt. No such claim has been asserted by Gulf against Norexim in this action.

to arrange for payment in Egypt of expenses to be incurred in connection with the Suez Canal transit of the *Tento*. At the request of Permal, its affiliate in Port Said, Egypt, disbursed $41,131.74 on Coin's behalf. This sum covered tolls, canal dues, tug hire, berthing, ports and lights dues and pilotage. Coin, S.A. did not pay Permal, and Permal claimed a maritime lien against the *Tento* for the unpaid balance, which the district court found to be $12,376.91.

Under the law of Italy maritime lien rights are determined by reference to the law of the vessel's flag, here Norwegian, and the law of Norway does not recognize a maritime lien for fuel furnished to a vessel. The law of Egypt does not recognize a maritime lien for advances made at the request of a vessel's time charterer.[3] American law, on the other hand, recognizes a maritime lien in both cases. The district court interpreted *Lauritzen v. Larsen*, 345 U.S. 571 (1953), to require application of American law rather than the law of Italy or Egypt and, accordingly, gave judgment against the *Tento* for Gulf in the amount of $105,447.46 and against the *Tento* for Permal in the amount of $12,376.91. (Gulf CR 51; Permal CR 31.)

Norexim filed a separate appeal from each judgment. The United States Court of Appeals for the Ninth Circuit consolidated the appeals and affirmed both judgments in a single opinion.

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[3]There is no dispute between the parties concerning the laws of Italy, Norway and Egypt in regard to maritime liens.

REASONS FOR ALLOWANCE OF THE WRIT

The Court Of Appeals Has Decided Important Questions Of Federal Law But Has Followed Neither The Authority Of This Court Nor That Of Its Own Earlier Decisions

The First Question Presented. The Court of Appeals attempted to apply to this case the choice of law principles first announced in *Lauritzen v. Larsen,* 345 U.S. 571 (1953), and subsequently expanded in *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970), *rehearing denied,* 400 U.S. 856. However, this is not a tort case involving injuries to foreign seamen as those cases were. It is not even a contract case. It is a case involving the existence of non-consensual[4] maritime liens that may arise when supplies or services are provided to a vessel. This Court has considered choice of law in maritime cases only in the context of injury claims of foreign seamen brought under the Jones Act. Thus an important question arises whether the choice of law test in such cases should be applied to the facts of the present case, keeping in mind this Court's caution that the *Lauritzen* test "is not a mechanical one." *Hellenic Lines Ltd. v. Rhoditis, supra,* 398 U.S. at 308.

The Court of Appeals below observed at 694 F.2d 1193, Appendix A-4, that *Lauritzen* is consistent with the broad choice of law principles of section 6 of the Restatement

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[4]"[M]aritime liens arise separately and independently from the agreements of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract." *Rainbow Lines, Inc. v. M/V Tequila,* 480 F.2d 1024, 1026 (2d Cir. 1973) (footnote omitted).

(Second) of Conflict of Laws (1971) (hereinafter "Restatement"), and petitioners agree. Section 6 provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) The protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

However, the Court of Appeals failed to note that the Restatement also prescribes particular factors to be taken into account in specific choice of law situations. Thus one form of analysis is provided for tort cases in section 145,[5]

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[5]Section 145 of the Restatement provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

and another quite different analysis for choice of law in non-consensual lien cases in section 251.[6] The section 145 analysis largely encompasses the tort choice of law prin-

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(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[6]Section 251 of the Restatement provides:

(1) The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the security interest under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

See also comment (f) to Section 251 which discusses non-consensual liens.

Historically, American courts have looked to the law of the place where the vessel was located as the most significant factor in the determination of maritime lien rights. *See, e.g.*, Negus v. *S.S. Northern Star*, 1925 A.M.C. 1135, 1139 (E.D.N.Y. 1925) (not reported elsewhere); The *Kaiser Wilhelm II*, 230 F. 717, 719 (D.N.J. 1916) *reversed on other grounds* 246 F. 786 (3rd Cir. 1917); The *Scotia*, 35 F. 907 (S.D.N.Y. 1888). In Rainbow Line v. *M/V Tequila*, 480 F.2d 1024 (2d Cir. 1973), a case involving maritime lien rights arising under a charter party, the court evaluated the various contacts there involved, but noted that "no one test can be stated for all maritime lien cases," and cited The *Scotia* as "authority for the proposition that a lien for supplies furnished the

ciples of *Lauritzen* and *Rhoditis*. When the court below decided to use the specific *Lauritzen/Rhoditis* methodology to decide choice of law in maritime lien claims, it simply ignored the fact that the application of the flexible principles of section 6 of the Restatement vary according to the context in which the choice of law issue arises.

The central issue here is the importance to be given to the location of the vessel at the time the maritime lien is claimed to have attached. Restatement section 251 provides that among the various factors which may be considered under section 6 greater weight will usually be given to this factor than to any other factor, yet the Court of Appeals considered it "happenstance and insubstantial". 694 F.2d at 1196, Appendix A-12. Comment (f) to section 251 of the Restatement states why location of the vessel is the factor usually of greatest weight:

> A person who deals with a chattel should have a definite and precise basis for determining whether he will acquire a non-consensual lien on the chattel by reason of such dealing. Such a person would usually expect that the local law of the state where he dealt with the chattel would be applied to determine whether he had acquired a non-consensual lien thereon.

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vessel should be determined by the law of the place of the transaction." 480 F.2d 1026 n.5. The earlier commentators also held this view. ("It seems clear that the creation of a [maritime] lien must be governed by the law of the place where the vessel is situated when the services are rendered." Note, "What Law Governs Maritime Liens", 26 Harv. L. Rev. 356, 358 (1913). "The validity of a lien on a chattel is determined by the law of the state of the situs of the chattel at the time the lien is created: so of a . . . lien on a vessel for supplies, material or labor . . . ." 2 Beale, Conflicts of Law § 279.1 (1935) (footnotes omitted).)

The teaching of the Restatement is that the location of the vessel at the time respondents' maritime liens are claimed to have attached is not just insubstantial happenstance, but an important factor affecting certainty, predictability and uniformity of result, as well as promoting ease in determination of the law to be applied. See Restatement section 6, *supra,* paragraphs (f) and (g). Contrary to the principles of the Restatement, the Court of Appeals held that giving substantial weight to the factor of the location of the vessel would neither promote certainty and predictability nor facilitate ease in determination of the law to be applied. 694 F.2d 1195, Appendix A-9. Thus, the Court below failed to follow the generally accepted choice of law principles set out in the Restatement and adopted by implication by this Court in *Lauritzen.*

The Second Question Presented. The question of the shipowner's base of operations arises only if the Court of Appeals was right in applying the tort choice of law analyses of *Lauritzen* and *Rhoditis,* rather than an analysis suited to maritime liens. The court below found that the location of the vessel, its flag and the nationality of the shipowner were factors of small importance compared to the fact that the vessel made a significant number of voyages to the United States and the fact that the sub-charterer of the vessel had contracted in New York for the supplies and services. 694 F.2d at 1192, 1196 n.7, Appendix A-2, A-11 n.7. This led the Court of Appeals to conclude that "the base of operations of the relevant business venture" was in the United States. 694 F.2d at 1194, n.7, Appendix A-11 n.7.

While the court below claimed to be applying *Lauritzen, Rhoditis* and its own decision in *Phillips v. Amoco*

Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980), *cert. denied, sub nom. Romilly v. Amoco Trinidad Oil Co.*, 451 U.S. 920 (1981), in fact it misapplied all three. Thus, the *Lauritzen* court rejected the view that a vessel's "frequent and regular" commerce with the United States alone provided a basis for the application of United States law, 345 U.S. at 581, and under *Lauritzen* the frequency of the *Tento's* voyages is irrelevant to the choice of law question. If this Court decides that choice of law concerning claims of maritime lien is to be governed by the Ninth Circuit's tort analysis, then it will be necessary to decide the significance, if any, in the maritime lien context of the trading pattern of the shipowner's vessel.[7]

The court below was no more successful in attempting to apply *Rhoditis* and *Phillips*. It found that the center of the transactions between respondents and the sub-charterer

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[7]In attaching weight to the voyages of the *Tento* to the United States it seems likely that the court below confused the concepts involved in evaluating the minimum contacts required for personal jurisdiction with those applicable to choice of law. The extreme to which the significance of voyages of the shipowner's vessel can be carried in the context of a foreign seaman's injury claim is illustrated by the recent decision of the Fifth Circuit in *Fisher v. The Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *rehearing denied*, 636 F.2d 1107 (1981), *cert. denied, sub nom. Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816, *rehearing denied*, 454 U.S. 1129, in which the court appeared to be similarly confused in holding that a single voyage to the United States was alone sufficient to constitute maintenance by the shipowner of a base of operations in the United States. The opinion of Judge Brown which accompanied the *en banc* denial of the shipowner's request for rehearing illustrates the sharp division within the Fifth Circuit on the correctness of the result in *Fisher*. The decision has been characterized as "a mockery of *Lauritzen*". Watson, *Applicable Law in Suits by Foreign Offshore Oil Workers*, 41 La. L. Rev. 827, 847 (1981).

was New York and concluded that the United States was the *shipowner's* base of operations. There is no factual parallel here to either *Rhoditis* or *Phillips*. In *Rhoditis* the foreign shipowner maintained offices in New York and the major shareholder was a United States domiciliary who from New York managed vessels engaged in a regularly scheduled trade to and from the United States. The Court found that the shipowner had a United States base of operations. The facts in the present case bear no resemblance to those facts, and the *Rhoditis* decision is therefore inapplicable. In *Phillips* the transactions upon which the court focused involved the shipowner's day-to-day operation of its vessel in Trinidad. Transactions between third parties, such as those found in the present case, were not involved. Moreover, the Ninth Circuit acknowledged in *Phillips* that "if this were a typical maritime case involving a vessel sailing in international commerce, it would appear that American law would apply." 632 F.2d at 86 (footnote omitted). Although the *Tento* was such a vessel, the Court of Appeals applied to the *Tento* transactions a test which it had created to deal with a vessel operating at a fixed location. Thus the opinion below was inconsistent with an earlier opinion in the same circuit.

The Third Question Presented. In deciding that American law applied to respondents' maritime lien claims the Court of Appeals was also influenced by its reading of the legislative history of the 1971 amendment to the Ship Mortgage Act, 46 U.S.C. sections 911-984. In 1971 Congress amended section 973 of the maritime lien provisions of the Ship Mortgage Act, 46 U.S.C. sections 911-984. Prior to the amendment, section 973 provided:

> The officers and agents of a vessel specified in section 972 shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. Subsection R, 41 Stat. 1005.

The amendment deleted the provision of section 973 that follow the semicolon. 85 Stat. 285.

The Court of Appeals in this case perceived that Congress, by amending section 973 in the manner just described, demonstrated "its intent that maritime liens be enforced even if it was the charterer rather than the owner who had ordered the supplies giving rise to it [*sic*]." 694 F.2d 1194, Appendix A-6, A-7. This perception led the court below to conclude that "it is appropriate . . . to adopt choice of law rules consistent with congressional policy." 694 F.2d 1195, Appendix A-8, A-9.[8] In the context of this case these statements necessarily mean that the Court of Appeals discerned a congressional intent that American law be applied extraterritorially to give lien

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[8]Because of its interpretation of Congressional intent, the Court of Appeals discounted the relevance of McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), in which this Court found the base of operations test inappropriate in determining the application of a statute regulating labor conditions on a foreign flag vessel in the absence of a clear Congressional mandate. 694 F.2d 1194-95, Appendix A-8.

rights to American suppliers who transact business with foreign flag vessels in foreign ports.

This Court has never decided whether or not Congress intended that the lien provisions of the Ship Mortgage Act should have extraterritorial application. The legislative history of the 1971 amendment of section 973 does not support the Ninth Circuit's notion of congressional intent. On the contrary, it shows that the statute was amended solely to provide protection to American suppliers from a contractual term in charter agreements which, as the result of the decision of this Court in *United States v. Carver*, 260 U.S. 482 (1923), had the effect of preventing American suppliers from acquiring liens against chartered vessels. Thus, we find in the House report:

> At the present time, a "prohibition of lien" clause in a charter party and the Ship Mortgage Act preclude a supplier from acquiring a lien on a vessel for necessaries furnished to the vessel. The bill would amend the Ship Mortgage Act to permit a supplier to acquire such a lien despite a "prohibition of lien" clause in the charter party . . . .
>
> Your Committee wishes to emphasize that H.R. 6239 makes no change in maritime lien law, the priority of maritime liens, or in the accepted definition of necessaries. [H.R. Rep. No. 92-340, 92nd Cong., 1st Sess. 1 (1971), *reprinted in* [1971] U.S. Code Cong. & Ad. News 1363, 1365.]

There can be no doubt that the 1971 amendment of section 973 was concerned solely with altering the law regarding "prohibition of lien" clauses in charter parties and was not an expression of congressional intent that American law be applied to the furnishing of goods or services to a foreign flag vessel in a foreign port.

The consequence of the choice of law analysis employed by the Court of Appeals and its decision to give extra-territorial effect to the maritime lien statutes is to grant a non-consensual security interest enforceable in American courts against any foreign vessel which trades to the United States and which also has been involved in a foreign transaction arranged by an American based company. Given the status of the United States as the world's largest trading partner and the fact that the great majority of ships making voyages to and from this country fly foreign flags, this security interest will apply to thousands of international transactions and will encourage the filing of *in rem* lawsuits in the federal courts involving transactions which occurred far from our shores. The result-oriented choice of law approach in the decision below unduly emphasizes American interests, and thus ignores the policies underlying the decision of this Court in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981) *rehearing denied,* 455 U.S. 928 (1982), as well as in *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 9 (1972), where this Court admonished that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

The Decision Below Conflicts With A Decision Of The Court Of Appeals For The Fifth Circuit

The decision below conflicts with that of the Fifth Circuit in *Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield,* 658 F.2d 363 (5th Cir. 1981), *cert. denied,* 102 S.Ct. 2932 (1982), which the Ninth Circuit did not discuss or cite in its opinion. In that case, Gulf (one of the respondents here) brought an *in rem* action to recover

for the cost of bunkers furnished to the vessel at Cristobal, Canal Zone, concededly then an American port, pursuant to an agreement negotiated and concluded in London between Gulf and the time charterer who subsequently became insolvent. Gulf caused the vessel to be arrested in a Texas port, claiming to be entitled to a maritime lien under 46 U.S.C. section 971. Relying on the fact that Gulf and the time charterer had a long relationship of contracting in England for fuel, the vessel owner argued that English law should apply to the fuel contract rather than the law of the place where the fuel was supplied. The Court of Appeals for the Fifth Circuit rejected the argument and held that American law applied to a maritime lien claim for supplies furnished to a foreign flag vessel in an American port.

The decision below conflicts with the Fifth Circuit *Gulf Trading* decision in at least three particular respects. First, the Fifth Circuit held that the lien arose by operation of law and was separate from the contract to provide supplies, 658 F.2d at 366, so choice of law was not affected by the place in which the contract was made, see 658 F.2d at 367, whereas the Ninth Circuit in this case thought it of great importance that the contracts were made in New York, 694 F.2d at 1196 n.7, Appendix A-11 n.7. This conflict is relevant to the first of the questions here presented for review.

Secondly, the Fifth Circuit took note at 685 F.2d at 366 n.3, of the factors listed by this Court in *Lauritzen v. Larsen, supra,* but decided the case by following the choice of law factors set forth in section 6(2) of the Restatement.[9] It did not attempt to determine the shipowner's

[9]See p. 7, *supra.*

base of operations or the frequency with which its vessel called at American ports. On the other hand, the Ninth Circuit misapplied the principle from *Phillips v. Amoco Trinidad Oil Co., supra,* and found the shipowner's base of operations to be the center of the contractual transactions between respondents and the agent of the subcharterer. This conflict is relevant to the first, and more particularly to the second, of the questions here presented for review.

Thirdly, the Fifth Circuit found that 46 U.S.C. section 971 was intended to protect American suppliers *in American ports.*

> The congressional intent is that an American supplier of goods, services or necessaries to a foreign vessel obtains a maritime lien on the vessel when the goods or services are supplied or performed *in the United States.* [658 F.2d at 367 (emphasis added).]

As we have shown, the Ninth Circuit concluded that Congress intended the maritime lien statutes to apply when the goods or services are supplied or performed in foreign ports. This conflict is relevant to the third of the questions here presented for review.

Taken together, these three clear points of difference show that the two circuits have failed to agree on even the basic form of analysis to be used in choice of law concerning maritime liens. The Ninth Circuit looks to the place of the contracts for supply, seeks the shipowner's "base of operations", and finds that Congress intended to protect American suppliers in their world wide operations. The Fifth Circuit finds the place of the contracts and the shipowner's base of operations to be of no relevance

whatsoever, and discerns a congressional intent to protect American suppliers only in their transactions in American ports. The conflict is so sharp that it must lead to inconsistent results. If this Court decides the questions presented in this petition it will settle the most important differences between the two circuits and ensure uniform application of the law.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a writ of certiorari to review the decision of the Court of Appeals and thus establish appropriate criteria for choice of law in maritime lien cases.

Respectfully submitted,

R. Frederic Fisher
Attorney for Petitioners

D. Thomas McCune
Of Counsel

APPENDIX

Page

A. Opinion of the Court of Appeals A-1

B. Gulf Trading & Transportation Co. v. *M/V Tento*
Civil No. C78 0339 WAI

(i) Findings of Fact and Conclusions of Law A-13

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C. Permal Shipping v. *M/V Tento*
Civil No. C78 0340 WAI

(i) Findings of Fact and Conclusions of Law A-20

A. Opinion Filed December 20, 1982

Gulf Trading & Transportation Co., and Permal Shipping Co.,
Plaintiffs-Appellees,

v.

The M/V Tento, her engines, tackle, boilers, etc., in rem,
Defendant,

I/S Norexim,
Claimant-Appellant.

Nos. 80-4151, 80-4158 and 80-4176.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 15, 1981.

Decided Dec. 20, 1982.

Appeal from the United States District Court for the Northern District of California.

Before Kennedy and Tang, Circuit Judges, and Hoffman,* District Judge.

Kennedy, Circuit Judge:

This case presents certain choice of law questions respecting maritime liens. Liens were filed against the M/V Tento (Tento) when it docked at the Port of Stockton, in the Eastern District of California. The underlying claims arose from two separate transactions, the first with Gulf Trading & Transportation Company (Gulf), the second with Permal Shipping Company (Permal).

*Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The Tento is a Norwegian flag vessel owned by I/S Norexim (Norexim), a Norwegian corporation. Norexim placed the Tento under time charter to Aspen Steamship Company (Aspen), and Aspen subchartered to Coin, S.A. (Coin). Both Coin and Aspen operated from New York City. Norexim's charter to Aspen provided that United States law would govern certain aspects of the agreement and that the charterer was responsible for obtaining the Tento's fuel oil. The Tento had made a significant number of voyages to United States ports in the past[1] and on the voyage giving rise to the claim it embarked from the United States for the Suez Canal.

While Tento was enroute, Coin decided to refuel it in Italy, and the Gulf transaction resulted. One Rodriguez acted for a New York based company that had served as an agent for Coin. At Coin's instance, Rodriguez asked a fuel broker in New York City to order oil for the Tento to be bunkered in Italy. The broker contacted Gulf Oil Corporation at its New York sales office and made an oral contract for sale and delivery of fuel oil.

Gulf, a Delaware corporation, used an Italian company, AGIP, to deliver the fuel oil in Italy. Gulf paid AGIP and charged the Tento $105,447.46. As one might predict at this point, neither Coin, as subcharterer, nor Norexim, as owner, paid the invoice.

The second transaction was with Permal, a New York corporation. Again on Coin's behalf, Rodriguez requested

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[1]Before being chartered to Coin, the Tento had just been to Providence (Rhode Island), Bridgeport (Connecticut), and Baltimore. Following the charter with Coin, the ship went to Philadelphia, Savannah (Georgia), New York, Providence, and Boston before it left for Egypt.

Permal in New York City to advance approximately $40,000 for the Tento's Suez Canal transit. Permal complied and sent invoices, but $12,376.91 is still owing.

Gulf and Permal initiated *in rem* actions against the Tento by arresting the vessel in Stockton, California. The charter having terminated, Norexim was operating the vessel. The vessel posted security and Norexim appeared to defend the actions against the vessel. Gulf asserted a maritime lien for the fuel oil, and Permal asserted a maritime lien for the canal expenses.

Here and in the district court, Norexim contended that Italian and Egyptian law govern the Gulf and Permal transactions respectively, and that under those laws the owner's vessel is not subject to liens for expenses incurred by the sub-charterer.[2] It argued Italian and Egyptian law control because the correct choice of law is determined by a single point of contact for the separate transactions, namely, the country where the supplies were obtained. In the alternative, Norexim asserted that even if the choice of law were made by weighing all the points of contact in each transaction, Italian law rules the Gulf transaction and Egyptian law the Permal one. Rejecting Norexim's arguments, the district court determined United States law applies to each transaction, and we affirm.

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[2]The parties agree that the courts of neither Norway nor Egypt would recognize a maritime lien for advances made at the request of a vessel's time charterer, and that Italian law would determine maritime lien rights by reference to the law of the ship's flag, in this case, the law of Norway. Hence, by obtaining the imposition of Italian and Egyptian law, Norexim seeks to avoid the liability that it would incur under United States law for the obligations of its charterer. We have made no independent determination on these points.

In *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), the Supreme Court was required to resolve a choice of law question in a maritime tort suit under the Jones Act. The Court adopted an approach similar to the second Restatement of Conflicts. *See* Restatement (Second) of Conflict of Laws § 6 (1971). The Court's approach was to set forth the points of contact between the transaction and various jurisdictions and to weigh and evaluate them. *Id.* at 582, 73 S.Ct. at 928. Its review included the place of the wrongful act, the flag of the ships, allegiance or domicile of the injured seaman, allegiance of the shipowner, place of signing the employment contract, accessibility of a foreign court, and the law of the forum.

In a subsequent decision, the Supreme Court declared that the factors in *Lauritzen* were not exhaustive. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309, 90 S.Ct. 1731, 1734, 26 L.Ed.2d 252 (1970).[3] The vessel's "base of operations," that is, the shipowner's center of management and the location most benefited economically by the business of the vessel,[4] is also relevant. *Id.* at 309, 90 S.Ct. at 1734. The Supreme Court has extended the *Lauritzen* approach to "guide courts in the application of maritime law generally." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382, 79 S.Ct. 468, 485, 3 L.Ed.2d 769 (1959).

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[3]The Court further explained that the test was not a mechanical one and the "significance of one or more factors must be considered in light of the national interest served by the assertion of [a state's] jurisdiction." 398 U.S. at 309, 90 S.Ct. at 1734.

[4]The "base of operations" criterion has been employed frequently since the *Rhoditis* decision. *See, e.g., Fisher v. Agios Nicolaos*, 628 F.2d 308, 317 (5th Cir. 1980), *cert. denied*, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981); *Mattes v. National Hellenic American Line, S.A.*, 427 F.Supp. 619, 622 (S.D.N.Y.1977).

Norexim argues that in certain situations the *Lauritzen* analysis demands resort to a single contact to solve choice of law problems. In support of its theory, it points to *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 19, 83 S.Ct. 671, 676, 9 L.Ed.2d 547 (1963), where the Supreme Court intimated that *Lauritzen's* balance of contacts theory should not be applied to the ultimate, but that in certain circumstances the appropriate rule is to focus on a single point of contact.

Norexim asserts further that the needs of the shipping industry make it appropriate for courts to determine supply cases by resort to the single factor of the law of the place where the supplies were delivered. It posits that predictability of result is particularly important in mercantile transactions, and that reference to the law of the place of supply to resolve rights of the parties would lend certainty to such transactions. The use of a general contacts approach, according to Norexim, creates confusion because vessels attract contacts "as easily as their hulls grow barnacles." Norexim claims, moreover, that the burden of learning foreign law should be on suppliers such as Gulf and Permal because such companies have chosen to sell on a multinational scale. We reject these arguments.

The Second Circuit has already discredited the notion that choice of law in maritime lien cases should be made by looking solely to the law of the place of supply. *Rainbow Line, Inc. v. M/V Tequila,* 480 F.2d 1024, 1026 & n. 5 (2d Cir.1973).[5] Instead, the court required consideration of all points of contact with the various nations.

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[5]The court disapproved of one pre-*Lauritzen* decision which had intimated that the sole relevant contact was the place of supply. 480 F.2d at 1026 & n. 5.

Though we have not ruled on the appropriate approach for choice of law in the context of maritime liens, to hold that the choice of law in such cases is controlled by the significance of multiple contacts is consistent with our previous holdings, both in maritime cases involving other types of disputes and in non-maritime contract choice of law cases. A single contact approach would run counter to an important principle, which is the desirability, even the necessity, of accommodating the legitimate interests of separate sovereignties in vindicating their own legal policies. *Lauritzen,* 345 U.S. at 582, 73 S.Ct. at 928. This principle is of special import in admiralty, where international relations are delicate. In *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir.1980), *cert. denied,* 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981), a wrongful death and injury case, we held that the Jones Act did not apply to an accident occurring at a foreign based operation though the operator was an American based corporation with headquarters in California. We reviewed the factors listed in *Lauritzen,* noted that the list was not exhaustive, and stressed the importance of sensitivity to the interests of other nations. *Id.* at 84-85. In *Commercial Ins. Co. v. Pacific-Peru Construction Co.,* 558 F.2d 948, 952 (9th Cir. 1977), we referred to general choice of law doctrines to determine that contract choice of law issues were governed by the various contacts set forth in the Restatement. Similarly, we conclude here that all relevant contacts must be considered in maritime lien cases.

Our holding is consistent with congressional policy. When it amended the maritime lien provisions of the Ship Mortgage Act, 46 U.S.C. ch. 25, §§ 911-84 (1976), Congress demonstrated its intent that maritime liens be enforced

even if it was the charterer rather than the owner who had ordered the supplies giving rise to it. *Id.* at § 973. Before the amendment had been passed, it appeared that a prohibition of lien clause in a charter party barred the supplier from acquiring a lien on a vessel for necessaries furnished to it. The statute then in effect permitted a supplier to acquire such a lien despite a prohibition of lien clause in the charter agreement. Faced with a situation similar to the one before this court, Congress determined that the vessel, and not the American supplier, should bear the burden when a charterer has not paid for its supplies. The legislative history stated:

> Your Committee gave careful consideration to this problem of American materialmen where the owner, by chartering or surrendering possession of the vessel, clothes the master thereof with at least apparent authority to bind the vessel for necessaries furnished to the vessel. The question presented was where a loss occurs in this situation, whether it should be suffered by the owner of the vessel, or the American materialman who furnished such necessaries in good faith.
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> After careful consideration of the entire record, your Committee has concluded that, as a matter of equity, the owner should bear the loss in such a situation. As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea.

H.R.Rep. No. 92-340, 92d Cong., 1st Sess. 1, 3, *reprinted in* [1971] U.S.Code Cong. & Ad.News 1363, 1365.

Norexim's reliance on *McCulloch*, 372 U.S. at 10, 83 S.Ct. at 672, to support its place of supply theory is misplaced by reason of the differences in congressional policy applicable here and the policy before the court in *McCulloch*. *McCulloch* involved the reach of the National Labor Relations Act. The Court determined that it could not extend a statute regulating labor conditions to an alien crew without a clear congressional mandate. To do so would be an intrusion upon the internal affairs of a foreign sovereign absent congressional assent. The Court then noted that the legislative history of the Act characterized the law as " 'a bill of rights both for *American* workingmen and for their employers.' " *Id.* at 20, 83 S.Ct. at 677. The record not only was void of congressional approval for application of American law to such cases, but also it hinted congressional hostility to the idea. For this reason, the Court gave special importance to the law of the flag of the ship.

In the instant matter, Congress has expressly identified important policy reasons for extending the reach of the lien statute to foreign shipowners. A shipowner can protect itself by bonding the charterer or by dealing only with reliable charterers. It is not, moreover, inequitable to require shipowners whose charterers make orders on a multinational level to know the law of the nation in which their charters have extensive contacts. H.R.Rep. No. 92-340, 92d Cong., 1 Sess. 1, 3, *reprinted in* [1971] U.S.Code Cong. & Ad.News 1363, 1365. It is appropriate for the

court to adopt choice of law rules consistent with congressional policy.

There are further reasons why designating the place where supplies are furnished as the predominant source of governing law would be unwise in the maritime context. Maritime agreements are often made in locations different from the place where supplies are taken on board. The point of loading may be quite irrelevant to the expectations of the parties or to the national interest of the countries most concerned with the transaction. The case before us is an example. The Gulf transaction was negotiated in New York, and the principal contracting parties had offices there. That the fuel was bunkered in Italy was dictated in large part by the fortuity of the ship's location and intended route.

The determination where supplies are furnished in some cases may entail a metaphysical analysis bearing little relation to the interests of nations most affected by the transaction. In this case, for instance, the right of transit through the Suez Canal was an intangible. It would be a complex, and largely irrelevant, question to determine where the parties acquired that right.

Thus, a test giving dominance to the location where supplies were delivered does not have even the advantage of simplicity to recommend it. Were the place of furnishing supplies to provide the law for resolving each contractual dispute involving a ship of marginal solvency which stops at many ports, we would be required to embark upon an odyssey in foreign law that both we and the bar would soon regret. Judicial efficiency is a relevant factor in choice of law analysis, *see Commercial Ins. Co.,*

558 F.2d at 952, and it is not served by the place of supply rule advocated here.

We hold that choice of law questions involving maritime liens are to be resolved by weighing and evaluating the points of contact between the transaction and the sovereign legal systems touched and affected by it. This is not to say that multiple contacts are used merely as a device to determine which sovereign has the most compelling governmental interest in a transaction. *See Liew v. Official Receiver and Liquidator*, 685 F.2d 1192 (9th Cir.1982) (discussing the governmental interest and comparative impairment approach under California law). The interests of competing sovereigns may be taken into account without rejecting altogether the contacts the bar and the maritime industry are accustomed to weigh in making the initial determination of governing law.[6] At least in the present case, these goals are not in conflict with each other. Given the substantial contacts between the United States and the Gulf and Permal transactions, they point towards

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[6]We are aware that some courts have chosen not to balance the interests of the United States with those of other nations, but have phrased the question as whether the contacts to the United States were substantial enough to allow a court to effectuate the purposes of American law. *See, e.g., Fisher*, 628 F.2d at 316; *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440-41 (2d Cir.), *cert. denied*, 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959) (quoted with approval in *Hellenic Lines*, 398 U.S. at 309 n. 4, 90 S.Ct. at 1734 n. 4). However, this circuit and other courts have posed the inquiry as whether the United States had significant connections to the transaction compared to those of the foreign forums. *See, e.g., Lauritzen*, 345 U.S. at 582; *Phillips*, 632 F.2d at 86. *See generally* Carlson, *The Jones Act and Choice of Law*, 15 Int'l Law. 49, 52-55 (1981); Watson, *Applicable Law in Suits by Foreign Offshore Oil Workers*, 41 La.L.Rev. 827, 843-49 (1981).

United States law as the most appropriate for resolving this litigation. The Tento had significant trade at United States ports. The injured parties here were United States companies approached by other United States companies in New York City, and their agreements were made there.[7] This is not the case of a United States corporation entering into a supply agreement overseas with a foreign company. There are not even any injured foreign parties; AGIP was paid. Finally, Norexim had contracted for the application of American law with reference to its charter, even if not with the claimants before us.[8] Arguments that

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[7]Norexim argues that the relevant base of operations was Norway, because it maintained its headquarters there. However, "[w]e . . . follow cases that have focused on the base of operations of the relevant business venture rather than of the corporate owner of the vessel." *Phillips*, 632 F.2d at 88. The center of the Gulf and Permal transactions was clearly New York, not Norway. Moreover, revenue for many of the Tento's past voyages was derived from United States ports. These circumstances fix the "base of operations of the relevant business venture" in the United States.

[8]Norexim contends that its intention to have United States law apply as evidenced by its clause in the charter party is irrelevant because "maritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract. . . ." *Rainbow Line*, 480 F.2d at 1026. In the *Rainbow* case, a charterer and a third party mortgagor claimed maritime liens against a vessel. If American law controlled, then the charterer would gain priority over the mortgagor. The charterer asserted that United States law should govern because it was so intended by the parties to the charter. The court ruled the charterer's intent was not decisive of the priority of its claim over a third party with which it had no agreement. The court was merely stating an obvious truism—non-parties cannot be bound by an agreement. But Norexim *was* party to the agreement in question. This does not necessarily mean that third parties can hold Norexim to an agreement to which they themselves cannot be held, but it shows that the choice of American law conforms to Norexim's original expectations.

the ship carried a Norwegian flag, had a Norwegian owner, and received some of its supplies in Italy and Egypt, are happenstance and insubstantial by comparison. These factors do not warrant applying the laws of either Norway, Italy, or Egypt.

AFFIRMED.

B(i). Findings and Conclusions filed on February 28, 1980

In the United States District Court
For the Northern District of California

No. C-78-0339-WAI

Gulf Trading & Transportation Co.,
Plaintiff,

v.

M/V Tento, her engines, tackle, boilers, etc.,
Defendants.

February 28, 1980

Findings of Fact and Conclusions of Law

This cause came on for trial before this Court pursuant to the stipulation of the parties by and through their respective counsel upon designated portions of depositions, designated exhibits and written argument. All of the foregoing having been duly considered, the Court now makes its Findings of Fact in the manner following.

Findings of Fact

(1) Plaintiff filed its Complaint *in rem* against the cargo vessel M.V. Tento, her engine, tackle, boilers, etc. in the amount of $105,447.46 plus interest and costs on February 14, 1978.

(2) Claimant I./S. Norexim appeared as shipowner and claimed the vessel following its arrest and seizure which occurred on or about January 30, 1978.

(3) Jurisdiction and venue are not here in contention between the parties.

(4) Franz P. K. Werner at all times relevant to this case was a bunker broker in New York City, employed by J. H. Winchester and conducting transactions on the account of J. H. Winchester and of Werner Shipping, Inc.

(5) Franz P. K. Werner, in his capacity as a bunker broker, on June 22, 1977, received a request from Michael Rodriguez, understood by Werner to be president of Great Northern Maritime, agent for one or all of Taimur Line Shipping, Coin S.A. and/or Stembulk Maritime, Inc. The request concerned an order for fuel oil to be furnished M.V. Tento at Taranto, Italy, or Augusta, Italy. At that time Werner was advised by Rodriguez that M.V. Tento was under time charter to one of the aforementioned companies for which Great Northern Maritime was agent.

(6) On June 22, 1977, Werner made inquiry of Charles Featherer, a marine sales engineer employed by plaintiff at its New York sales office, with respect to the willingness of plaintiff to supply the M.V. Tento with fuel oil. On or about the same date an oral contract was entered into in New York by Werner and plaintiff for the supplying of the fuel oil. No written contract was entered into.

(7) At the time of the oral contract Werner Shipping, Inc. had an established credit account with plaintiff with a limit of $250,000.00.

(8) Plaintiff as a general practice would not accept an order or contract to sell and deliver fuel oil to a vessel unless the order was placed by one having established credit with plaintiff or, if no credit had been established, on a C.O.D. basis.

(9) Plaintiff as a general practice made no inquiry as to the identity of the principal for whom a bunker broker acted in placing an order for fuel oil.

(10) At the time of the oral contract M.V. Tento was under time charter from her owner to Aspen Steamship Company and from the latter to Coin, S.A.

(11) At the time of the oral contract Franz P. K. Werner did not know that the fuel oil was ordered by the charterer rather than the owner and did not know the terms of the charter party.

(12) At the time of the oral contract plaintiff did not know that Werner was acting for charterers rather than for owners.

(13) At the time of the oral contract plaintiff did not know that M.V. Tento was operating under a time charter, did not know the terms of any charter party and did not know of any no lien provisions contained within any charter party.

(14) At the time of the oral contract plaintiff relied both upon the credit of Werner Shipping, Inc. and upon the credit of M.V. Tento.

(15) Pursuant to the oral contract 1098 metric tons of marine fuel oil and approximately 148 tons of diesel oil of which 98 tons were from plaintiff were delivered to and laden aboard M.V. Tento at Taranto, Italy, on June 24, 1977. Delivery was by AGIP, an Italian Company.

(16) The said fuel oil and diesel was duly invoiced to "M.V. Tento and/or owners," in the total sum of $105,447.46.

(17) The said sum of $105,447.46 is a reasonable value for the products so provided.

(18) Although demand was made, no part of said invoiced sum has been paid and the whole remains due, owing and unpaid.

(19) At the time of delivery of the fuel oil and diesel no copies of any charter party were aboard M.V. Tento and no notice of charter party was aboard.

(20) Prior to the loading of the fuel oil and diesel aboard M.V. Tento neither plaintiff nor AGIP was informed by any of the ship's company of the existence or terms of any charter party.

(21) Through communication by the master of M.V. Tento the shipowners had actual notice of M.V. Tento's need for fuel oil and diesel prior to the occurrence of the events detailed above.

From these Findings of Fact the Court concludes in the manner following.

Conclusions of Law

(1) The law of the United States determines whether plaintiff has a maritime lien upon M.V. Tento.

(2) Plaintiff at no relevant time had knowledge of any no lien provision in any charter party applicable to M.V. Tento.

(3) Plaintiff relied in part upon the credit of M.V. Tento in supplying fuel oil and diesel to M.V. Tento.

(4) Plaintiff has a valid maritime lien upon M.V. Tento for the value of fuel oil and diesel to M.V. Tento plus interest from date of invoice.

(5) No conduct on the part of plaintiff constitutes waiver of its valid maritime lien upon M.V. Tento.

(6) Plaintiff is entitled to judgment against M.V. Tento in the sum of $105,447.46, together with interest thereon at seven percentum per annum (7%) from and after September 1, 1977, together with its costs of suit actually incurred.

Let judgment be entered accordingly.

Dated: 2/28/80

/s/ WILLIAM A. INGRAM
United States District Judge

B(ii). Memorandum of Decision filed July 21, 1978

In the United States District Court
For the Northern District of California

No. C-78-0339-WAI

Gulf Trading & Transportation Company,
Plaintiff,

vs.

M/V Tento, Her engines, tackle, boiler, etc., *in rem*,
Defendants.

July 21, 1980

Memorandum of Decision

The motion of claimant to dismiss is denied.

The Court believes that the "contact" test enunciated in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) is appropriate in this case. The place of supply is certainly recognized in *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024 (2nd Cir. 1973) as a valid test, but it is not the sole and only one and, in the situation presented by this case, is not the paramount and controlling one.

There are substantial United States contacts to this case. Both involved charter parties were consummated here. They are said to contain various references to United States law as controlling and contain an arbitration clause to be utilized under United States law. More immediately, the Bunker contracts in issue were negotiated and arranged for by a broker, a supplier, and the representative of a charterer all resident in the United States or in Puerto Rico, a United States territory.

There are strong contacts to Norway as well, but their substantiality does not compel rejection by this Court of the United States contacts. There are no contacts needful of consideration in Italy.

The motion of plaintiff for summary judgment is denied without prejudice, pending any further discovery that claimant may wish to take in order to effectively oppose it.

Dated: July 11, 1978

/s/ WILLIAM A. INGRAM
United States District Judge

C. Findings and Conclusions filed March 4, 1980

In the United States District Court
For the Northern District of California

No. C-78-0340-WAI

Permal Shipping, a Division of Permal International Inc.,
Plaintiff,

v.

M/V Tento, her engines, tackle, boilers, etc., in rem,
Defendants.

March 4, 1980

Findings of Fact and Conclusions of Law

This cause came on for trial before this Court pursuant to the stipulation of the parties by and through their respective counsel upon designated portions of depositions, designated exhibits and written argument. All of the foregoing having been duly considered, the Court now makes its Findings of Fact in the manner following:

Findings of Fact

(1) Plaintiff is a shipping company, and is a division of a New York corporation, Permal International, Inc., which is affiliated with an entity resident in Paris, France. Plaintiff has its principal office in New York City.

(2) At all relevant times M.V. Tento was owned by E.B. Aaby's Rederi A/S, Oslo, Norway, and was under time charter from that entity to Aspen Steamship Corporation of New York, and was under subcharter from Aspen to Coin, S.A., of New York.

(3) At all relevant times Great Northern Maritime, Inc. was an agent for Coin, S.A.

(4) At all relevant times Michael Rodriguez was president of Great Northern Maritime, Inc.

(5) At all relevant times John F. Cloarec was manager of Permal Shipping Company, plaintiff herein.

(6) In June, 1977, Cloarec called Rodriguez to solicit the business of the latter and specifically to conduct necessary transactions for vessels transiting the Suez Canal in the capacity of owner's representative. Specifically, the conversation related to three vessels, Valle de Unza, M.V. Tento, and Captain Pappis.

(7) In June, 1977, Rodriguez in New York asked plaintiff to advance $40,000 for the Suez transit of M.V. Tento. At the request of plaintiff, its affiliate in Port Said, Egypt, advanced $41,131.74 to facilitate the Suez transit of M.V. Tento. This sum covered tolls, canal dues, tug hire, berthing, ports and lights dues and pilotage. An additional sum of $317.51 was advanced for expenses of M.V. Tento's crew.

(8) Before the transit of M.V. Tento, and on or about July 1, 1977, in New York City, Cloarec received from Rodriguez a letter of guarantee promising payment in the sum of $40,000. On or about July 19, 1977, after the canal transit of M.V. Tento plaintiff received a guarantee in the sum of $40,000 from Werner Shipping which was to be paid from a freight assignment to Werner Shipping.

(9) Prior to the canal transit of M.V. Tento, the Valle de Unza transited the canal and plaintiff received an advance from Great Northern Maritime in the sum of

$20,000 for transit expenses. Plaintiff disbursed $20,022.50 in connection with that transit.

(10) After the canal transit of M.V. Tento, and on or about July 27, 1977, plaintiff at the request of Great Northern advanced $19,387.83 for the canal transit of Captain Pappis.

(11) On or about August 12, 1977, plaintiff received a freight assignment for freight owed by Commodity Steel of Detroit in the sum of $65,425.64 of which a total sum of $45,425.54 has been paid. This assignment was to cover the amounts owed plaintiff by Great Northern for the Suez transits of M.V. Tento and Captain Pappis.

(12) Except for sums paid under the freight assignment just referred to, no part of the transit costs of M.V. Tento or Captain Pappis have been paid.

(13) Plaintiff did not know that M.V. Tento was under time charter before the advance of $40,000 was paid.

(14) Plaintiff did not know that charter parties under which M.V. Tento operated contained "no lien" clauses before the advance of $40,000 was paid.

(15) M.V. Tento is a Norwegian flag vessel and at all relevant times her owner was a citizen and resident of Norway.

(16) Both charter parties under which M.V. Tento operated at all relevant times were entered into in New York City.

(17) Plaintiff, in advancing sums for the canal transit of M.V. Tento, relied upon the Great Northern letter of guarantee and upon the credit of M.V. Tento.

(18) A preponderance of the evidence does not show waiver of a maritime lien upon M.V. Tento, either express or implied.

(19) Plaintiff understood that it could collect from M.V. Tento if Great Northern, the guarantor under the letter of guaranty, did not pay.

(20) By reason of the premises, there presently remains due, owing and unpaid to plaintiff by reason of expenses advanced and still unpaid for the Suez Canal transit of M.V. Tento the sum of $11,376.90.

(21) Every significant and substantial portion of the transaction as a result of which a maritime lien is here asserted occurred in the United States between persons and/or entities resident in the United States except the actual payment of transit expenses to those to whom they were due, which occurred in Egypt, and the residence of the ship owner and the registry of the vessel which is in Norway.

Upon the facts found as aforesaid the Court concludes in the manner following:

Conclusions of Law

(1) The law of the United States determines whether plaintiff has a maritime lien on M.V. Tento.

(2) Plaintiff relied on M.V. Tento when supplying advances.

(3) Plaintiff has a valid maritime lien on M.V. Tento for the value of advances made, plus interest from the date of the advances.

(5) Judgment is granted to plaintiff against M.V. Tento in the amount of $11,376.90 together with interest thereon from and after July 3, 1977, at the rate of seven percentum per annum (7%), and costs of suit actually incurred.

Dated: 3/4/80.

/s/ WILLIAM A. INGRAM
United States District Judge

Office-Supreme Court, U.S.
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No. 82-1557

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

I/S NOREXIM, and M/V TENTO,
Petitioners,

vs.

GULF TRADING & TRANSPORTATION Co., and
PERMAL SHIPPING Co.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED

Respondents submit that the issues Petitioners raise are more accurately stated by the following questions:

1. Was it proper for the Court of Appeals to apply the modern contact analysis test announced by the Supreme Court in *Lauritzen v. Larsen* and by the Court of Appeals for the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila* for choice of law to determine the validity of a maritime lien claim against a vessel for supplies or services, or should the Court of Appeals have applied a single factor approach that the law of the place of supply governs?

2. If the choice of law test applicable to a maritime lien claim is the modern contact analysis approach, should the Supreme Court review the decisions of the District Court and the Court of Appeals in this case that United States law applied to impose a lien on a Norwegian flag vessel for bunkers supplied pursuant to an agreement made in the U.S. between two U.S. parties, although delivery of those bunkers was in Italy, and for canal expenses supplied pursuant to an agreement made in the U.S. between two U.S. parties, although the canal expenses were advanced in Egypt, where by consent of the owner the vessel's base of operations at the relevant times was in the United States?

3. Should the Supreme Court review the conclusion of the Court of Appeals that its holding was consistent with congressional policy stated in the legislative history of the 1971 amendment to 46 U.S.C. § 973?

4. Is the decision by the Ninth Circuit Court of Appeals in this case inconsistent with the decision of the Fifth Circuit Court of Appeals in *Gulf Trading & Transportation*

Co. v. The Vessel Hoegh Shield (5th Cir. 1981) 658 F.2d 363, where both courts applied the modern contact analysis approach enunciated by the Supreme Court in *Lauritzen v. Larsen* and by the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila*?

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To the United States Court of Appeals
For the Ninth Circuit

STATEMENT OF FACTS

Respondents Gulf Trading & Transportation Company (Gulf) and Permal Shipping Company (Permal) brought separate *in rem* actions in the District Court against the vessel *Tento*. Petitioner I/S Norexim (Norexim) was not a named defendant but appeared as claimant of the vessel and defended the actions on the vessel's behalf.

The *Tento* is a Norwegian flag vessel owned by Norexim, a Norwegian corporation. Norexim placed the *Tento* under time charter to Aspen Steamship Company (Aspen), and Aspen subchartered the vessel to Coin, S.A. (Coin). Both Aspen and Coin operated from New York City. Norexim's charter to Aspen provided that United States

law would govern certain aspects of the agreement and that the charterer was responsible for providing fuel to the *Tento* and canal tolls. The charter party between Aspen and Coin placed similar obligations upon Coin. Both charter parties were "made and concluded" in New York City. Charter hire was to be paid to Norexim's bank account in New York. Arbitration of disputes under the charter parties was to be held in New York. While the *Tento* was under charter to Coin, the ship's Master took his operating and sailing directions from Coin's agent in New York. Before being chartered to Coin, the *Tento* had just called at Providence (Rhode Island), Bridgeport (Connecticut), and Baltimore (Maryland). Thereafter, following the charter to Coin, the ship next went to Philadelphia, Savannah (Georgia), New York, Providence, and Boston.

While the *Tento* was at sea en route from Boston to Taranto, Italy, the ship's Master sent a request to Coin's agent in New York for additional bunkers, which the Master expected to be delivered in Port Said, Egypt. However, the *Tento's* discharge of cargo in Taranto was greatly delayed, to the point that the ship was so low on diesel oil that it could not leave the berth. The Master sent several urgent requests to New York for bunkers to be supplied at Taranto rather than in Egypt.

The Gulf Transaction

Coin's New York agent asked a fuel broker in New York City to order fuel for the *Tento* to be supplied in Italy. The broker contacted Gulf at its New York sales office and made an oral contract with Gulf in New York for sale and delivery of the bunkers.

Gulf, a U.S. corporation, used an Italian company, AGIP, to deliver the fuel to the *Tento* in Italy. Gulf paid AGIP and charged the *Tento* $105,447.46. The invoice remains unpaid.

The Permal Transaction

Permal, which operates from New York City, is a division of a New York corporation, Permal International, Inc. Coin's New York agent asked Permal in New York to advance payment in Egypt of expenses to be incurred in connection with the Suez Canal transit of the *Tento*. Permal arranged for payment of $41,131.74 for tolls, canal dues, tug hire, berthing, port and light dues, and pilotage, and $317.51 for the expenses of two crew members. Permal claims a maritime lien for the unpaid balance, $12,376.91.

Proceedings Below.

Gulf and Permal initiated *in rem* actions against the *Tento* by arresting the vessel in Stockton, California. The charters having terminated, Norexim was operating the vessel. The vessel posted security and Norexim appeared to defend the actions against the vessel. Gulf asserted a maritime lien for the fuel oil, and Permal asserted a maritime lien for the canal expenses.

In the United States District Court for the Northern District of California and in the Ninth Circuit Court of Appeals, Norexim contended that Italian law (which referred to Norwegian law) governed the Gulf transaction and that Egyptian law governed the Permal transaction, and that under those laws the *Tento* was not subject to a maritime lien for fuel or canal expenses. Norexim argued that Italian and Egyptian law controlled because choice

of law in a maritime lien case should be determined by a single point of contact: the country where the supplies were delivered. In the alternative, Norexim argued that even if the choice of law were made by weighing all the points of contact in each transaction, Italian law should rule the Gulf transaction and Egyptian law should rule the Permal transaction. Rejecting Norexim's arguments, the District Court determined that United States law applies to each transaction, and that under U.S. law the claimed liens were valid, and so gave judgment against the *Tento* in favor of Gulf in the amount of $105,447.46 and in favor of Permal in the amount of $12,376.91. The Ninth Circuit Court of Appeals affirmed. 694 F.2d 1191.

I

THE COURT OF APPEALS APPLIED THE SETTLED AND PROPER TEST FOR CHOICE OF LAW TO DETERMINE THE VALIDITY OF A MARITIME LIEN CLAIM AGAINST A VESSEL FOR SUPPLIES OR SERVICES

Petitioner argues that the modern choice of law principles announced in *Lauritzen v. Larsen* (1953) 345 U.S. 571, 97 L.Ed. 1254, 73 S.Ct. 921 should be restricted to tort cases involving injuries to foreign seamen. The law is settled to the contrary. The Supreme Court has clearly stated that a U.S. court should resolve all maritime choice of law questions by ascertaining and evaluating points of contact between the transaction in issue and the countries whose competing laws are involved. While *Lauritzen v. Larsen, supra,* concerned a Jones Act claim for maritime personal injury, the Supreme Court in *Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354, 382,

3 L.Ed. 2d 368, 79 S.Ct. 468 held that the choice of law principles set forth in *Lauritzen* are to govern choice of law problems in all maritime cases, with due regard for the differing interests of the relevant aspects of maritime law, and for the interacting interests of the United States and the foreign countries involved. *Romero, supra,* 358 U.S. at 382-3. These choice of law principles have been consistently applied when courts have decided whether U.S. law should determine the validity of a claimed maritime lien on a vessel. See, e.g., *Rainbow Line, Inc. v. M/V Tequila* (2d Cir. 1973) 480 F.2d 1024, 1026-7; *Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield* (5th Cir. 1981) 658 F.2d 363, cert. den. (1982) 102 S.Ct. 2932; *Mobil v. Pacific Bear* (N.D. Cal. 1979) 1980 A.M.C. 1409. The *Romero* decision also rejected the use of any fixed or single factor rule of conflicts law. 358 U.S. at 383. Amplifying *Romero* was *Hellenic Lines, Ltd. v. Rhoditis* (1970) 398 U.S. 306, 26 L.Ed. 2d 252, 90 S.Ct. 1731, which confirmed the *Lauritzen* approach and added that the contacts considered in the *Lauritzen* case are neither exhaustive nor necessarily entitled to equal weight in a given context. 398 U.S. at 309.

The Court of Appeals in this case applied the *Lauritzen* test in determining choice of law. Petitioner's argument that *Lauritzen* and its progeny are limited to seamen's personal injury actions is clearly at odds with precedent, including that of the Supreme Court.

Petitioner therefore also argues that while *Lauritzen* is "consistent with the broad choice of law principles" of the Restatement (Second) of Conflict of Laws, § 251(2) of the Restatement requires that overriding importance be given

to the location of the vessel when the supplies are delivered. This is an incorrect interpretation of the Restatement, and is in effect to urge the application of the obsolete "single factor" approach under the guise of the Restatement. Section 251(2) has never been so interpreted or used by any court. The Court of Appeals considered this argument and found that the location of the vessel in this particular case was "happenstance and insubstantial" compared to other factors in these transactions. The Court of Appeals correctly decided that on the facts of this case Restatement § 251(2) did not compel the kind of single factor approach that the *Lauritzen* rule was promulgated to avoid. The *Lauritzen* rule does not and should not require slavish adherence in maritime cases to the Restatement, let alone to any particular section of the Restatement.

The Restatement approach in deciding what law to apply to determine the validity and effect of a security interest in a chattel is, in any event, the same modern approach of evaluating contacts and interests as is required by the *Lauritzen* rule. Restatement (Second) § 251(1) states:

> "The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the *most significant relationship* to the parties, the chattel and the security interest under the principles stated in § 6. (Emphasis added.)

Comment e to this section directs the court's attention to the relevant policies of all potentially interested states and the relative interests of those states. These are criteria

similar to those set forth in *Lauritzen* and followed by the Court of Appeals.

Section 251(2) only makes sense when applied to an immoveable chattel, not to a vessel in international commerce. This is recognized by Comment e to § 251, which states:

> "The situation is different when it is understood that the chattel will be kept only temporarily in the state where it was located at the time the security interest attached. Here it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the security interest and be the state of the applicable law."

The Court of Appeals correctly applied the *Lauritzen* choice of law approach. The Court of Appeals considered the location of the *Tento* where the bunkers and canal tolls were provided, but determined that other factors and interests were more significant. Restatement § 251(2) does not and should not override this approach.

Petitioner suggests that historically (that is, before *Lauritzen*) U.S. courts looked to the law of the place where the vessel was located as the most significant factor in determining maritime lien rights. There are a few early district court cases, all from the 1920's or before, in which the courts indicated that the question whether vessel suppliers had a maritime lien was to be determined by the law of the place where the supplies were provided. (Petitioner has cited these cases on p. 8, fn. 6.) These old cases are without precedential value insofar as they contradict *Lauritzen* and *Romero*. In these earlier cases the contracts for ob-

taining the supplies generally were made in the same place where the supplies were provided, and the authorities upon which these earlier cases rely hold that the place of the "transaction" rather than the place of "supply" is the controlling consideration. See *The Scotia* (S.D.N.Y. 1888) 35 Fed. 907, in which the court stated that the law of the place of supply is to be applied where the contract is both *made and performed* entirely within the jurisdiction where the supplies are furnished. (35 Fed. at pp. 909-910.) Similarly, in *Rainbow Line, Inc .v. M/V Tequila* (2d Cir. 1973) 480 F.2d 1024, 1026, footnote 5, the court stated that there is authority for the proposition that a lien for supplies furnished to the vessel should be determined by the law of the place of the "transaction", not necessarily the place of supply. Of course, in the 1920's and before—that is, before the advent of world-wide communication systems—supplies were generally ordered where they were obtained, so the courts had little reason to distinguish between the place of contract and place of supply; the two were nearly always the same. Now however the contract for supplies can, as in these transactions, be made thousands of miles from the place of delivery. Thus it is appropriate for a court to apply modern choice of law rules and consider all the contacts and interests involved in the transaction, not merely the place of supply.

The Court of Appeals applied the correct choice of law rules. There is no basis for concluding that the *Lauritzen* rule should not be applied to maritime lien cases or that the *Lauritzen* rule adopts a single factor "place of supply" approach in maritime lien cases.

II

THE COURT OF APPEALS PROPERLY APPLIED THE CHOICE OF LAW RULES TO THE FACTS IN THIS CASE

Petitioner argues that the Court of Appeals misapplied the rules of *Lauritzen* and *Rhoditis*. Weighing contacts and interests must, of course, be done on a case by case basis, and courts must be allowed some discretion in this task. It is hardly appropriate to complain to the Supreme Court that the Court of Appeals somewhat underweighed or somewhat overweighed a particular factor. All choice of law decisions would be subject to Supreme Court review under that standard.

Petitioner argues that the Court of Appeals erred by finding that the base of operations of the shipowner was in the United States. Not so. The Court of Appeals correctly held that the *vessel's* base of business operations is also relevant. Here, the owner had contractually agreed to charter its vessel to companies based in New York, which controlled the vessel's movement from there. The injured parties were U.S. companies approached by other U.S. companies in New York, the supply agreements were made in New York, the shipowner's charter party was by its terms governed by U.S. law for several purposes, and the *Tento* had significant trade at U.S. ports. Perhaps of most significance, the Court of Appeals found that Italy and Egypt had no interest in having their law apply here, particularly because none of their nationals were injured. Petitioner does not substantially address these findings. Instead Petitioner focuses on the Court of Appeals' statement that the base of operations of the relevant business venture was in the U.S., a statement made in

a footnote (694 F.2d at 1196, fn. 7) in response to Petitioner's argument that the shipowner's base of operations was Norway. To ask the Supreme Court to review that statement is to isolate and overly emphasize a single factor in a multi-factor choice of law decision.

The Court of Appeals did not find that the *shipowner's* base of operations was in the U.S. Rather, the Court of Appeals found that the base of operation of the *relevant business venture* was in the U.S. That finding is clearly appropriate in this case. The shipowner's base of operations was relevant in *Rhoditis* because the shipowner was the defendant and allegedly was personally liable for the seaman's injury. In this case the action is not against the shipowner but against the vessel, and it is the vessel's, not the shipowner's, base of operations that is relevant here. The *Tento* was in fact operated out of New York insofar as events relevant to the issues in dispute in this case. The charterer in New York was responsible for providing bunkers and canal expenses to the vessel, and did so from New York. The Court of Appeals decision therefore is consistent with its decision in *Phillips v. Amoco Trinidad Oil Co.* (9th Cir. 1980) 632 F.2d 82, cert. den. (1981) 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312, which also focused on the base of operations of the relevant business venture rather than of the corporate owner of the vessel. Regardless, any such conflict would be better left to the Ninth Circuit to resolve.

The weighing of contacts and interests in a choice of law analysis necessarily requires some judicial discretion. Petitioner raises no questions about the analysis by the Court of Appeals in this case that is worthy of review by the Supreme Court.

III

THE HOLDING OF THE COURT OF APPEALS IS CONSISTENT WITH CONGRESSIONAL POLICY

The Court of Appeals noted that its holding was consistent with congressional policy, quoting (694 F.2d at 1194) the following from the legislative history to the amendment of the Maritime Lien Act, 46 U.S.C. § 973:

> "Your Committee gave careful consideration to this problem of American materialmen where the owner, by chartering or surrendering possession of the vessel, clothes the master thereof with at least apparent authority to bind the vessel for necessaries furnished to the vessel. The question presented was where a loss occurs in this situation, whether it should be suffered by the owner of the vessel, *or the American materialman who furnished such necessaries in good faith.*
>
> • • •
>
> "After careful consideration of the entire record, your Committee has concluded that, as a matter of equity, the owner should bear the loss in such a situation.
>
> "As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea. (House Committee Report No. 92-340, 1971 U.S. Code Cong. and Admin. News, p. 1365.) (Emphasis added.)

Petitioner argues that this legislative history is not relevant. Indeed it is. Congress intended to protect American suppliers of necessaries. This statement of legislative policy is not restricted to foreign flag vessels that are provided supplies in U.S. ports. The Court of Appeals was certainly correct in stating that its decision comported with this stated policy.

The Court of Appeals did not base its decision on the legislative history. The Court of Appeals based its decision on an analysis of the relevant contacts and interests involved in these transactions. Therefore, this dictum about the legislative history, while correct, would not be an appropriate basis for Supreme Court review in any event.

Nor did the decision of the Court of Appeals "unduly emphasize American interests", as Petitioner contends. The Court of Appeals was specifically mindful of "the desirability, even the necessity, of accommodating the legitimate interests of separate sovereignties in vindicating their own legal policies" (694 F.2d at 1194), and "the interests of competing sovereigns". (694 F.2d 1195.) Simply put, neither Italy nor Egypt has any interest in this case, or in having their law apply to this case. U.S. interests, on the other hand, are obvious and significant.

IV

THE DECISION OF THE NINTH CIRCUIT IN THIS CASE IS CONSISTENT WITH THE DECISION BY THE FIFTH CIRCUIT IN GULF TRADING & TRANSPORTATION CO v. THE VESSEL HOEGH SHIELD

The decision by the Ninth Circuit in this case is consistent with that by the Fifth Circuit in *Gulf Trading and Transportation Co. v. The Vessel Hoegh Shield* (5th Cir. 1981) 658 F.2d 363, cert. den. (1982) 102 S.Ct. 2932. Both cases determined choice of law governing the validity of maritime liens by applying the modern choice of law rules set forth by the Supreme Court in *Lauritzen* and subsequent cases and by the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila.* In the *Tento* case, the relevant contacts and interests call for the application of American

law. In the *Hoegh Shield* case, the relevant contacts and interests also called for the application of American law, albeit for different reasons. In each case an American supplier asserted a maritime lien against a vessel resulting from a transaction with a dominant locus in the U.S. This is not to say that U.S. law would always apply to maritime lien issues, and neither Court of Appeals so held or stated.

The two cases are consistent on the issues that Petitioner addresses. First, in the *Hoegh Shield* case the place of contracting was not ignored. On the contrary, it was given significant attention. (See 658 F.2d at 366-7.) But in that case it was "only half of the story". (658 F.2d at 367.) The other half of the story was that the bunkers were supplied by an American supplier in a U.S. port. Therefore the U.S. had an interest in the application of its law to the transaction, an interest that outweighed the interest of Great Britain in having its law apply to the case. In both the *Hoegh Shield* and in the *Tento* cases, therefore, the U.S. had an important interest in applying U.S. law, while the relevant foreign countries had little or no interest in having their law apply. That the U.S. interests are based on *different* factors in each case does not make them *inconsistent.*

Second, as described above, the Ninth Circuit did not rely on the *shipowner's* base of operations, but rather on the fact that the relevant part of the business venture's base of operations was in the U.S. That factor was not important in the *Hoegh Shield* case, and the Fifth Circuit never addressed it. Thus there is no inconsistency with the Ninth Circuit's decision in this case.

Third, while the Fifth Circuit found that 46 U.S.C. § 971 was intended to protect American suppliers in U.S.

ports, the Fifth Circuit never stated that U.S. lien law was to be *restricted* to cases of supply by American suppliers in U.S. ports. The court did not need to reach that question, and so never discussed it. The Fifth Circuit finding on this point is thus not inconsistent with the Ninth Circuit's.

Since the two decisions are essentially consistent in their approach to choice of law in maritime lien cases, there is no significant conflict between the Circuits for the Supreme Court to resolve.

CONCLUSION

Respondents respectfully submit that the Supreme Court should not grant a Writ of Certiorari to review the decision of the Court of Appeals in this case. As the Court of Appeals stated: "It is not . . . inequitable to require shipowners whose charterers make orders on a multinational level to know the law of the nation in which their charters have extensive contacts." 694 F.2d at 1195.

Respectfully submitted,
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No. 82-1557

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Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Respondents' Brief so drastically distorts the questions raised and represents Petitioners' points with such sophistry that it requires reply.

Contrary to Respondents' assertion (Resp. Brief pp. 1, 6), we do not claim to restrict the standards of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), to seamen's injury claims, although *Lauritzen* and its progeny in this Court arose from such claims and are cast in terms particularly applicable to them. Nor do we contend for a "single contact" theory. Rather, we assert that this Court has not (as the courts below thought) extended the accepted doctrine of choice of tort law reflected by *Lauritzen* and the *Restatement* (§ 145) to the exclusion of the corresponding *Restatement* formulation (§§ 6 & 251) of the relevant contacts in

maritime lien cases, pursuant to which "greater weight will usually be given to the location of the chattel at the time the security interest attached than to any other contact in determining the state of the applicable law," *Restatement* § 251(2). The Court of Appeals dismissed the location of the vessel as "happenstance and insubstantial". Burdened with the Ninth Circuit's indefensible disregard of the applicable *Restatement* formulations, Respondents merely cavil by remarking that "the *Lauritzen* rule does not and should not require slavish adherence in maritime cases to the *Restatement*, let alone to any particular section of the *Restatement*." Resp. Brief p. 6.[1]

Respondents subtly attempt to shift attention from the critical events of furnishing bunkers in Italy and canal tolls in Egypt to occurrences in New York which they characterize as the "transactions". Resp. Brief, pp. 4, 8, 13. But the United States statute they invoke does not confer a lien for the transactions of broking, arranging or agreeing to provide. It confers a lien for nothing other

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[1]Respondents also assert that *Restatement* section 251(2) "only makes sense when applied to an immovable chattel, not to a vessel in international commerce." (Resp. Brief, p. 7.) They attempt to find support for this assertion in comment (e) to section 251. This comment deals with *consensual* security interests, as its first sentence makes clear. Comment (f), discussed at page 9 of the Petition, is concerned with *non*-consensual security interests. Respondents do not dispute that a maritime lien is a non-consensual security interest. Hence, their reliance on comment (e) is misplaced. The distinction between consensual and non-consensual security interests is an important one. In the case of the former the parties negotiate their agreement, and they are therefore aware of circumstances which may reduce the weight to be given to the location of the chattel as a factor in determining the law to be applied to their agreement. In the case of non-consensual security interests no negotiations take place, and the focus of the parties is necessarily on events which occur where the chattel is located. Hence, it is appropriate to give that factor greater weight, and the possibility that that chattel may be moved is of little significance.

than "furnishing" (46 U.S.C. § 971), something done by AGIP, the Italian company in Italy and by Permal's Egyptian affiliate in Egypt. The New York "transactions" relied upon by Respondents did not include the shipowner, the ship (which was not even in this country at the time) nor any agent of the ship. And the vessel was far from the United States when U.S. law is supposed to have operated upon it to create a lien which could then be acquired by an American company. In any event, the place of contracting has been characterized as "fortuitous and of little importance" in the *Lauritzen* context, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959), and no reason exists here to give it greater significance, particularly since Petitioner Norexim was not a party to the Gulf and Permal contracts with the vessel's sub-time charterer.

Respondents assert that Italy and Egypt have no interest because their nationals are in this instance uninjured (as a result of payment). Resp. Brief p. 9. They do not speak of Norway. Do Italy and Egypt really have no interest in the extent to which lien rights are acquired by foreign nationals acting through local companies, particularly where, as here, such rights are asserted to be greater than those available to Italian and Egyptian nationals? And does Norway have no interest in the manner in which other countries permit the assertion of lien claims against a Norwegian flag vessel owned by a Norwegian national? And does the predominant interest in such a question shift to any other country a national of which acquires a claim against the vessel through a fortuitous chain of communication and contracting unknown to the vessel owner?

Although Respondents now seek to minimize its impact (Resp. Brief, pp. 9, 10), their argument for a "base of operations" in New York was accepted below and what influence it had can not now be weighed here. Nor can the erroneous view of New York as "base of operations"

be justified by shifting attention from the shipowner to the "business venture". The base of operations criterion has not been applied by this Court (or the lower courts in other cases) to fix liability on a party not operating at that "base of operations", and there is no dispute here that Petitioner Norexim operated its vessel from Norway, not New York.

In sum, Respondents ask this Court to let stand a nationalistic choice of law analysis which unjustly facilitates the application of American law to lien claims of American companies against foreign flag vessels for supplies and services rendered in foreign ports, even though such vessels are neither beneficially owned by American nationals nor operated from the United States. Such a result should not be sanctioned by this Court, and the Petition for Certiorari should be granted.

Respectfully submitted,

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